

## The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part V

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### I. THE SHOWER'S MEMORY—THEN AND NOW<sup>1</sup>

For a long time now, the shower has occupied a significant place in the U.S. cultural archive, and a highly fraught one in the sub-archive of the LGBT-related *Kulturkampf*.<sup>2</sup> After its seeming disappearance from prominence for a number

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<sup>1</sup> Earlier parts of this work appear as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020) [hereinafter Spindelman, *The Shower's Return, Part II*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020) [hereinafter Spindelman, *The Shower's Return, Part III*]; and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV*, 81 OHIO ST. L.J. ONLINE 117 (2020) [hereinafter Spindelman, *The Shower's Return, Part IV*].

<sup>2</sup> An important aspect of the U.S. cultural archive and the sub-archive of LGBT-related *Kulturkampf* is how the shower scene involved in the LGBT Title VII cases traces a genealogy that moves to and through the history and cultural politics of struggles for cis-women's sex equality rights, including the national conversation over the Equal Rights Amendment, which famously featured both bathrooms and same-sex marriage among the reasons the measure did not become part of the federal Constitution on the timeline many had hoped for. These items are tracked, with some key sources on sex-segregated restrooms—not showers—in Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 146–57 (2017) (discussing the “history of the public restroom,” and noting

years, its reemergence in a central position in the LGBT Title VII sex discrimination cases can stir a complex range of collective and individual memories, including traumas associated with how the shower worked to closet and bring ruin to lesbian women's and gay men's lives, prominently, but not exclusively, the professional lives of lesbian and gay military servicemembers who were prevented from openly serving the nation as who they were and are until that military ban was fully lifted less than a decade ago.<sup>3</sup> The re-emergence of the shower scene in the LGBT Title VII litigation, its structural elements basically still intact, testifies not merely to a certain lack of creative imagination by foes of LGBT rights arguing before the Supreme Court, but also to the profound ways the shower continues to exert a powerful hold on our nation's cultural and symbolic life in the areas of sex, gender, sexual difference, and inequality. Evidently, the shower still can set pro-LGBT and anti-LGBT mind-bodies ablaze, if in very different ways.

As a cultural reference point with a track record of meaningful, if ultimately historically limited, success, the shower scene is intensely regulatory in its operations. Translated from a fantasy depiction into a real-time governance rule, its function is to reflect and reinforce, hence yield, structurally hierarchical arrangements of power, including state power, that position certain bodies with authority over others, managing which bodies may go where and with what attendant qualities of life.<sup>4</sup>

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how it is inflected by “considerations of race, class, moralism, and gender”). Mary Anne Case's work on bathrooms and sex discrimination is a vital passage point when thinking on the topic. *See, e.g.,* Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211* (Harvey Molotch & Laura Noren eds., 2010). For other, more gay-inflected aspects of this history, see GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 207–25 (1994) (notes on bathhouses); *id.* at 475 (entry for “Tearoom (washroom) trade”). *See also generally* Lee Edelman, *Men's Room*, in *STUD: ARCHITECTURES OF MASCULINITY 152* (Joel Sanders ed., 1996); Lee Edelman, *Tearooms and Sympathy, or, the Epistemology of the Water Closet*, in *THE LESBIAN AND GAY STUDIES READER 553* (Henry Abelove et al. eds., 1993).

<sup>3</sup> *See generally* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); Press Release, Office of the Press Sec'y, Statement by the President on the Repeal Don't Ask, Don't Tell (Sept. 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell> [<https://perma.cc/R8BS-PNBR>]. A timeline is provided by Clay Flaherty, *Don't Ask, Don't Tell Timeline*, *JURIST* (Sept. 20, 2011), <https://www.jurist.org/archives/timelines/dont-ask-dont-tell/> [<https://perma.cc/ZX7N-WTMR>]. “Seeming” is crucial here, given how, although many people may have missed it, the shower played its part in the Trump Administration's still ongoing ban on trans military service. *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 28–31 (Feb. 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/55KQ-HXJG>] (discussing “separate berthing, bathroom, and shower facilities”).

<sup>4</sup> For a turn-around, see *infra* text accompanying note 35.

The elemental building blocks of the shower scene, like the rules of haircare as Elle Woods once described them, are both “simple and finite.”<sup>5</sup> First comes a basically heroic normative figure naked in a shower—regularly imagined not in the singular but in the plural. Then, in dramatic relief, comes the scene’s villain, illegitimately invading the space and claiming it as “his” own. If today’s protagonists are heroines, cis and impliedly straight women, in the 1990’s gays-in-the-military debates, they were our nation’s fighting finest: heterosexual men, military troops. Today’s villain, a trans woman, misgendered as in John Bursch’s commentary as a man “who identifies as a woman” but who “looks like a man,”<sup>6</sup> has taken over the role once occupied by her older gay male brother, not a limp-wristed pansy who’d never graduate from basic training, but, like the lethal, low-voiced sexually insane criminal the trans woman has been phobically figured to be, a menacing homosexual male alpha dog trained to attack and to kill other men.<sup>7</sup> Constructed this way by the U.S. military, this homosexual’s homosexuality was thought to make him, at least when he was naked in the shower with other men, an unpredictable social “other” who couldn’t be guaranteed to remain squarely inside the conventional lines of military discipline and order. In the showers, perhaps elsewhere, his own inner sexual monster, possessed of the assets of military training, could come out.

There’s nothing especially remarkable about the shower scene—then and now, a temporal gap that traumas associated with it may collapse—representing gay men and trans women in a homologous light. However erroneously and problematically, states of sexual and gender abjection regularly make those occupying them seem indistinguishable, as seen from certain vantage points occupied by those in dominant social groups that manifest these forms of otherness from which their own status is superordinately marked.<sup>8</sup>

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<sup>5</sup> LEGALLY BLONDE 1:27:38 (Metro-Goldwyn-Mayer 2001).

<sup>6</sup> Transcript of Oral Argument at 45, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Oct. 8, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18107\\_4gcj.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18107_4gcj.pdf) [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript].

<sup>7</sup> For the image, see Spindelman, *The Showers Return, Part IV*, *supra* note 1, at 125–27 (discussing *The Silence of the Lambs*). A normative vision of men-loving-men soldiers, including as an historical force, is in PLATO, *Symposium*, in LYSIS • SYMPOSIUM • GORGIAS 73, 103 (W.R.M. Lamb trans., 2001) (1925) (discussing the prospects of an army made up of same-sex “lovers and their favourites”); *id.* at n.1 (noting “there was such a ‘sacred band’ . . . at Thebes, which distinguished itself at Leuctra (371 B.C.)”).

<sup>8</sup> This fungibility is undoubtedly now neoliberal in certain respects, but it also has a history in which what are now known as lesbian, gay, and trans identities, widely, if not universally understood to refer to very different and very specifically different types of people and ways of life, were located under larger overarching headings. *See, e.g.*, Henry Rubin, *The Logic of Treatment*, in THE TRANSGENDER STUDIES READER 482, 483 (Susan Stryker & Stephen Whittle eds., 2006) (“‘Sexual inversion’ referred to a broad range of cross-gender behavior (in which males behaved like women and vice-versa) of which homosexual desire was only a logical but indistinct aspect, while ‘homosexuality’ focused

The interchangeability of male and female heterosexual bodies in the shower scene is a puzzle of a different order. It's striking, and nearly astounding, recalling the shower scene's place in the wider setting of anti-LGBT rights discourses, which have long spotlighted the threats of homosexuality and more recently the threats of trans people to the ostensibly objective factual unavoidability, the rock bottom non-negotiability, of male-female sex difference. But there it is just the same.

Practically, male-female fungibility in this setting serves to construct the terms of a still socially-dominant gendered and sexualized identity—cis-heterosexuality—as defining a state of subjectivity that's simultaneously socially innocent and besieged by forces that ideologies of cis-heterosexual superiority exist in contrast to, both (to use their old labels) “homosexuality” and “transsexualism” being constructivist terms that are part of bids to identify, regulate, and dominate these figures.<sup>9</sup> As elsewhere, the paranoia of elites here reveals how precious heterosexual sexual innocence is insofar as it is manufactured through scenes like this, as an always-terrorized, embodied identity that needs constantly to be on guard, prepared to fight back with

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on the narrower issue of sexual object choice. The differentiation of homosexual desire from cross-gender behavior at the turn of the century reflects a major reconceptualization of the nature of human sexuality, its relation to gender, and its role in one's social definition.”) (quoting George Chauncey, Jr., *From Sexual Inversion to Homosexuality: The Changing Medical Conception of Female “Deviance”*, in *PASSION & POWER: SEXUALITY IN HISTORY* 87, 88 (Kathy Peiss & Christina Simmons eds., 1989)).

<sup>9</sup> Wittingly or not, this male-female fungibility may be a complex and highly contingent form of neoliberal fungibility. It is, after all, an argument that surfaces in the context of workers working within the economic machine and is even on the side of management (capital). That said, the logics here do seem to depend on norms that don't originate “within” market rationality, but rather “outside” it, whether in nature or as Bursch's client roughly characterized it, among “God[’s ]given gift[s].” *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, 1599 (2019) (mem.) (“Rost avers that he ‘sincerely believe[s] that the Bible teaches that a person’s sex is an immutable God-given gift.’”). For one cut into this, see the incisive and far-reaching reflections in SHANNON WINNUST, *WAY TOO COOL: SELLING OUT RACE AND ETHICS* 118 (2015) (“[G]ender in the mainstream culture of the United States has become a kind of playground for the neoliberal social rationality, offering up superficial spaces that are easily evacuated of any historical meanings and that are thus served up for endless self-enhancement and manipulation.”), and *id.* at 118–31 (additional related argument). For another cut, consider the study of the complex relations between neoliberal rationalist economic fungibility projects as they interface with religious and moral traditionalism as that interface is precisely and surprisingly traced in Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 *MINN. L. REV.* 889, 894, 903, 931–53 (2019) (tracing “distinctively moral form[s] of neoliberalism” in the context of certain “restorative justice” discourses and practices). The easy point and locus classicus for homosexuality's function as a regulatory category is MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 43 (Robert Hurley trans., 1978) (1976) (“The nineteenth-century homosexual became a personage, a past, a case history, and a childhood . . . the homosexual was now a species.”).

ferocious, even lethal, zeal against the sources of its own terrorization.<sup>10</sup> Not coincidentally, the shower scene also illustrates how profoundly heterosexuality is soaked in guilty terrors of sexual violence and harm, with that guilt—no doubt chiefly relating to cis-straight men’s manifest sexual violence against women across the expanse of social life—projected outward and onto thoughts of sexual and gender “others” who would present themselves, even if only in the heterosexualized imagination, naked and in proximity to heterosexual bodies in ways that sexualize the encounters, and, in the process, wash sex difference amidst the sexual violence they figuratively entail, out.<sup>11</sup>

This being the case, here’s an insight into why, in the face of imaginary prospects of gay male and trans female sexual predation, some straight cis-men and cis-women may identify themselves with one another as the potential victims of these fungible “others” whose own sexual and gender differences likewise disappear. The shower scene, constructed this way, points to the prospect that, despite initial appearances of differences between them, the trans shower scene, which is normatively prior to the gay male shower scene in the LGBT Title VII sex discrimination cases, bears uncanny resemblances in a genealogy to its historical antecedent. If this is not to figure one as the copy of the other, it does suggest they are both part of a composite photonegative in which the shower scene supplies an urgent, present-tense, but historically-grounded vision featuring a variable nonnormative queer “other” capable of materializing in different forms, and moving back and forth between them, while stalking and harming poor heterosexuals, all of whom still need relief and release from the sexual threat that queers pose if sex difference—and the social order built atop it—are to survive. Notably invisible within this negative—and undiscussed at oral arguments—are the full array of material mind-body dangers faced by trans people themselves in showers and locker rooms, which not uncommonly lead to safety-based closeting, a practice that lesbians and gay men, too, have undertaken in their own ways and for their own reasons in and across time.<sup>12</sup> The full array of material mind-body dangers and injuries that cis-

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<sup>10</sup> This is not in any way to overlook the material terrorization by cis-heterosexual men of cis-heterosexual women. See, e.g., Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1049–50, 1052–59 (1992) (discussing the “terrorization” of the cis-female body). The vast literature on cis-heterosexual women’s injuries at the hands of cis-heterosexual men offer volumes of irrefutable testimony on this. See generally, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010).

<sup>11</sup> Both Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983), and CATHARINE A. MACKINNON, *Desire and Power (1983)*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46 (1987), contain and generate important reasons for remaining deeply skeptical about the fungibility actually being that in ways that wash out all of its material sex-specificities.

<sup>12</sup> See, e.g., SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 154–55 (Dec. 2016), <https://www.transgender.org>

women confront at the hands of cis-heterosexual men are likewise not available within it.

In a sense, it is surprising that the shower scene makes any appearance in Gerald Bostock and Donald Zarda's Title VII sex discrimination cases. Neither Bostock's case, which involved an "award-winning advocate[] for child services" who maintained he was fired from his job for being gay after "he began participating in a gay recreational softball league," nor Zarda's, which involved a skydiving instructor who maintained he was fired after coming out to a young woman on the job in order "to assuage any concern" that she "might have about being strapped to a man for a tandem skydive," involved anyone showering, much less in the "wrong" shower.<sup>13</sup> Nevertheless, the shower scene is introduced in arguments in their cases and plays an important role in them, if not so predominant a role as in Aimee Stephens's case. Looking ahead, the shower scene is as significant in the sexual identity cases as it is, in part, because of what it helps to teach about the dynamics of the cultural thinking that's happening around it and what that can do in turn to help illuminate the cultural dynamics at work in Stephens's case as well.

The shower scene makes one single prominent appearance in the course of the defense's oral argument against Bostock and Zarda's claims that anti-gay discrimination is sex discrimination prohibited by Title VII.<sup>14</sup> As in Stephens's

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quality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/9YP7-W8H8] (noting responses of respondents who took steps to avoid discrimination including hiding gender identity at work).

<sup>13</sup> Brief in Opposition at 2, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Aug. 16, 2018) [hereinafter *Zarda Brief in Opposition*]; see Transcript of Oral Argument at 25, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_b97c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf) [https://perma.cc/9TZZ-FHMR] [hereinafter *Bostock Transcript*] ("award-winning advocates for child services"); Brief for Petitioner at 5–6, *Bostock v. Clayton Cty.*, No. 17-1618 (June 26, 2019) (discussing background of Bostock's termination); *Zarda Brief in Opposition*, *supra*, at 2–3 (discussing background of Zarda's termination).

<sup>14</sup> *Bostock Transcript*, *supra* note 13, at 48–49. References to it in the briefing in the case include Brief for Petitioners *Altitude Express, Inc.*, and Ray Maynard at 55, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Aug. 16, 2019) [hereinafter *Zarda Brief for Petitioners*] ("That view overthrows important, long-standing employment policies and practices. These include sex-specific policies for determining access to living facilities, sleeping quarters, restrooms, showers, and locker rooms; fitness tests for police, fire, and similar positions; and organizational dress and grooming standards."); Brief for Respondent at 8–9, *Bostock v. Clayton Cty.*, No. 17-1618 (Aug. 16, 2019) ("[S]ex discrimination [claims] cannot be analyzed identically as race discrimination claims . . . different treatment of men and women with respect to . . . privacy spaces (such as overnight facilities, locker rooms, restrooms and showers) [have been upheld], whereas no such differences based on race would be tolerated."); see also *Zarda Brief for Petitioners*, *supra*, at 11 (Zarda's view "actually forbids employers from distinguishing between the sexes or even considering sex at work[,] and "would topple sex-specific policies—such as restroom and locker-room access, fitness tests, and dress codes—and jeopardize the important interests that those policies advance."); *id.* at

case, the shower scene receives pride of place at a key moment in the defense's presentation: right at the tail end, or what was mistakenly believed to be the tail end, of the argument.<sup>15</sup> Approximate timestamp: shortly before arguments in Stephens's case begin.

Setting the stage for the shower's appearance, the legal position that Pamela S. Karlan, of Stanford Law School, was making on behalf of Bostock and Zarda, was a stylized, but ultimately straightforward, doctrinal inquiry. Its structure importantly sutured their cases to Stephens's trans sex-discrimination case while also providing a mechanism for differentiating between and among them. The test for Title VII sex discrimination that Karlan offered included two steps.<sup>16</sup> The first asked whether a plaintiff in any given sex discrimination case suffered discrimination because of his or her sex.<sup>17</sup> Here, Karlan relied on the standard doctrinal machinery that the Supreme Court had constructed in earlier Title VII sex discrimination cases, dating back to *Los Angeles Department of Water and Power v. Manhart*.<sup>18</sup> This inquiry is the familiar-in-this-setting "but-for sex" test: Would the plaintiff have suffered the discrimination that he or she experienced "but for" their sex? This inquiry, Karlan urged, should be followed by another to determine whether legally actionable sex discrimination took place. Henceforth, it would be necessary to show that a "reasonable person" in the plaintiff's situation would find themselves injured when they are discriminated against because of, or "but-for," his or her sex.<sup>19</sup> This insists a plaintiff must not simply experience but must *suffer* sex-based discrimination.

Bracketing some important questions and challenges, the elegant simplicity of this test, such as it is, is partly found in how it enables legal decision-makers to engage in what may be described as social identity-based legal tailoring. To illustrate the operation of Karlan's argument, a gay man, as a man, is easily seen to experience sex discrimination prohibited by Title VII if he is not allowed to dress as a woman at work or to use the ladies' restroom there ("but for" being a

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59 ("Most Americans—including people of faith, business owners, and anyone who uses sex-specific restrooms or locker-room facilities—will be affected by this ruling.").

<sup>15</sup> See *infra* text accompanying note 24 ("and the last point, running out of time . . ."), which was followed by additional exchanges, including those noted *infra* text accompanying notes 25–31. The relevant pages of the transcript are Bostock Transcript, *supra* note 13, at 48–52.

<sup>16</sup> David Cole endorsed this theory at oral argument on Aimee Stephens's behalf. See Harris Funeral Homes Transcript, *supra* note 6, at 4–6, 8–13, 15–17; see also Reply Brief for Respondent Aimee Stephens at 6, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Sept. 10, 2019) (same).

<sup>17</sup> Bostock Transcript, *supra* note 13, at 15 ("My test says that you have treated the people differently because of sex, which is what we are asking you to hold here. When you treat a gay man who wants to date a woman differently than a man -- woman who wants to date a woman, that -- that's discrimination.").

<sup>18</sup> City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

<sup>19</sup> Bostock Transcript, *supra* note 13, at 15 ("Then you get to what I've said, which is you have to ask whether a reasonable person under these circumstances would be injured by the imposition of the particular sex-specific world.").

man, meaning: if he were a woman, he would affirmatively have been allowed to do these things).<sup>20</sup> A reasonable gay man, however, would presumably *not* find sex discriminations like these to be injurious and so might not state a successful Title VII sex discrimination claim if required by an employer to dress as a man or to use the men's room.<sup>21</sup> A similarly situated trans woman under those circumstances, by contrast, would be both like and unlike the gay male plaintiff. Like the gay man, she would be discriminated against because of sex if she were barred from dressing as a woman at work under sex-specific dress standards or from using the ladies' restroom there ("but for" the sex she was assigned at birth, male, she would be allowed to do these things). But, unlike a reasonable gay man, a reasonable trans woman would find sex discrimination like this injurious, since it would keep her from being herself and living openly as herself at work.<sup>22</sup>

Challenging this position, Jeffrey M. Harris, for the defense, proposed that Karlan's theory was hardly the circumscribed rule Karlan made it out to be in her account. This is Harris quickly responding to a question from Justice Brett Kavanaugh before thinking and giving audible voice to his inner sense that the clock is about to expire on his argument. Time-pressured, Harris pivots to make one last, apparently important point before sitting down. Like Bursch's deployment of "the restroom scenario" soon would, Harris's invocation of what

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<sup>20</sup> See *id.* at 15–17 (providing context for the point, including the observation by Karlan that "[a]n idiosyncratic preference does not void an otherwise valid dress code or bathroom rule"). Textured discussion of the point is in Reply Brief for Respondents at 19–21 *Altitude Express, Inc. v. Zarda*, No. 17-1623 (Sept. 10, 2019) [hereinafter *Zarda Reply Brief*], which includes the notation that "the issue in each case involving sex-specific policies will be whether the employer's sex-differentiated treatment has *injured* the plaintiff," and the observation that, "if a court concludes that the employer's provision of separate restrooms is 'innocuous' as to the individuals who have sued, it will find no violation of Title VII." *Id.* at 20. Along similar lines is an amicus brief, cited approvingly by the *Zarda* reply brief, *Zarda Reply Brief*, *supra*, at 20–21, which maintains that: "Providing equal but sex-segregated restrooms in the workplace would not materially reinforce invidious sex-based stereotypes nor otherwise appreciably harm the vast majority of male or female employees, many of whom would, in fact, prefer not to use restrooms together with persons of the opposite sex—and therefore it would not 'discriminate against' such employees for purposes of Subsection 703(a)(1)." Brief for Professor Samuel R. Bagenstos et al. as Amici Curiae Supporting Respondent at 24–25, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (July 3, 2019). Justice Ruth Bader Ginsburg echoed this point during oral arguments. See *infra* text accompanying note 27; see also *infra* note 21.

<sup>21</sup> As Justice Ginsburg, clarifying, explains: "And the response to the bathrooms is who is the complaining plaintiff? And for most people, they would not be [the] complaining plaintiff. They would not be eligible because they're not injured by the separate bathrooms. In fact, they like it." *Bostock Transcript*, *supra* note 13, at 48. Gay men are presumably in this group.

<sup>22</sup> *Id.* at 16–17 ("JUSTICE GORSUCH: Is it idiosyncratic for a transgender person to prefer a bathroom that's different than the -- the one of their biological sex? . . . MS. KARLAN: No.").



he dubs the “bathroom[] . . . standard[]” involves a ladies’ shower.<sup>23</sup> Quoting from the Court’s official transcript:

MR. HARRIS: I don’t see a difference between the two as far as -- and -- and the last point, running out of time, I think to go back to some of the questions about bathrooms and fitness standards, I want to be clear, under the Plaintiff’s simple but-for test, if you truly simply apply the Manhart [“but-for”] test or -- in the way they want to do it, I don’t see any way that single-sex bathrooms or showering facilities . . . [.]<sup>24</sup>

In saying this, Harris indicates he is going to return to “some of the questions about bathrooms and fitness standards,” but the ultimate focus in these remarks, which is about to narrow further still, is on “single-sex bathrooms or showering facilities.”<sup>25</sup>

Justice Ruth Bader Ginsburg stops Harris before he can continue in order to correct his presentation of Karlan’s doctrinal test.<sup>26</sup> Justice Ginsburg underscores Karlan’s point about “injury”—would a reasonable person in the plaintiff’s situation be injured by the sex discrimination being claimed?—three times in quick succession, as if to ensure Harris cannot possibly miss the point again.

JUSTICE GINSBURG: You have to have someone who’s injured. You have to have someone who’s injured. And the response to the bathrooms is who is the complaining plaintiff? And for most people, they would not be [the] complaining plaintiff. They would not be eligible because they’re not injured by the separate bathrooms. In fact, they like it.<sup>27</sup>

In offering these thoughts, Justice Ginsburg completely ignores Harris’s mention of “showering facilities.”<sup>28</sup> Her remarks focus exclusively on bathrooms in their traditional sense and who wants to go in them, and then, having been refused, claims sex discrimination.

No sooner does Justice Ginsburg offer her thinking than Harris shoots back, carefully pulling discussion back to, to elaborate upon, the shower scene he has in mind, which, in passing, he refers to as being about “the women’s bathroom”<sup>29</sup>:

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<sup>23</sup> Harris Funeral Homes Transcript, *supra* note 6, at 45 (“the restroom scenario”); Bostock Transcript, *supra* note 13, at 48 (“bathroom[] . . . standard[]”). For discussion of the “women’s shower,” see *infra* text accompanying note 30.

<sup>24</sup> Bostock Transcript, *supra* note 13, at 48.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 49.

MR. HARRIS: Yes, Your Honor, although, of course, if someone, for example, is fired, imagine a factory with hazardous materials where people shower after work and to -- to clean up, and a -- a man used the women's bathroom and is fired. That person would certainly be injured. And I think, under my friend's test, they would say just change the sex and that person wouldn't have been fired.

But here's the problem: That's not a similarly situated person. The proper analysis would say that a neutral policy, such as use the showering facility that corresponds to your biological sex, the man who uses the women's shower, the -- the comparator is not a woman who uses the woman's shower. It's a woman who uses the men's shower, because otherwise you're not -- otherwise you're -- you're loading the dice or you're not looking at similarly situated people.<sup>30</sup>

Formally, Harris's argument utterly fails to track Justice Ginsburg's basic point and the vital doctrinal work the reasonable person in the plaintiff's situation standard does within Karlan's argument. In this sense, and on one level, Harris's answer is a bust.<sup>31</sup>

On an entirely different plane, however, Harris has in fact subtly offered a deep reply to the case Karlan has made, with its two-step doctrinal test, as well as Justice Ginsburg's observations about it. Harris is saying that he is certain that if the Supreme Court provides the statutory anti-discrimination protections that Karlan is asking it to, the Court would, in effect, be providing protections to, hence legitimating and normalizing, the shower scene's sex-based harms.

What harms, exactly, does Harris have in mind in saying this? Interestingly, his account of the shower scene is ambiguous on a central element. Saying this isn't primarily about how, in his haste, Harris neglects to say there are any cis-women in the shower he's describing when the "man" he describes showing up there shows up. Rather, it's to notice that Harris has not explained, and has thus left blurred and out of focus, who the man is who shows up in that shower. What's his gender and/or sexual orientation? Harris leaves this part out.

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<sup>30</sup> Bostock Transcript, *supra* note 13, at 48–49.

<sup>31</sup> According to Martha Chamallas:

Karlan's definition of injury (that a reasonable person would regard defendant's action as an injury) does not have much grounding in Title VII law. Usually we think about the injury requirement in Title VII as deriving from the statutory requirement that the defendant's conduct must alter the "terms, conditions, or privileges" of employment, the so-called "adverse action" requirement. Adverse actions are concrete, usually official steps, taken by the employer, such as terminations, transfers, etc. Thus, it is not surprising that Harris would try to pivot and focus on the firing of a man who used the women's restroom. He was clumsily making the point that injury relates to the firing and not to whether the injured person reasonably felt aggrieved.

Email from Martha Chamallas, Robert J. Lynn Chair in Law, Michael E. Moritz Coll. of Law, The Ohio State Univ., to Marc Spindelman, Isadore and Ida Topper Professor of Law, Michael E. Moritz College of Law, The Ohio State Univ. (May 22, 2020, 9:37 AM) (on file with author).

Normally, the invocation of the unmarked category “man” in a setting like this, which Harris carries through the full stitch of his point, might be taken as properly filled up by thinking about “man” in his conventional, normative sense. It’s possible, of course, that Harris was warning the Court about how it could be opening the door to a cis-straight man “sneakily” entering the ladies’ shower, getting fired, then legally complaining he suffered sex discrimination bound up with the adverse employment action of his firing as his injury.<sup>32</sup>

To understand Harris’s point this way introduces an important and novel element into the shower scene. It might be that the shower scene is actually about no one other than cis-straight men and their own normative cross-sex sexual proclivities being brought into the wrong place, making it non-normative in this sense, these men, and nobody else, being women’s real enemies in the showers where they, and nobody else, are the “foxes” who sexually want to invade these “henhouses” and who must be kept out lest women be sexually harmed.<sup>33</sup>

Seen this way, cis-straight men—who may initially appear as victims, hence objects, in the photonegative—may be its actual subjects: the persons who this whole sordid business about the ladies’ shower is really about and has been about all along, with some straight men’s own inner desires, projected onto others, being what everyone who is fretting is, finally, fretting about.<sup>34</sup> If so, the

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<sup>32</sup> Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 32 (2020) (Cole’s “answer conjured an image of men sneakily fighting for the right to enter women’s restrooms, the worst possible terrain.”).

<sup>33</sup> Possibilities of cis-heterosexual male predation are suggested, *inter alia*, in RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT 186–90* (2018), and the Brief for Women’s Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 7, *Gloucester Cty. Sch. Bd. v. G.G. ex rel Grimm*, No. 16-273 (Jan. 10, 2017) (insisting on the argument holding “[t]hat *any* man can justify his presence in *any* women’s restroom, locker room, or shower by saying ‘I identify as a woman’ will not escape the notice of those who already harass, assault, and rape tens of thousands of women every day”) (italics in original). See also Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to ‘Degender’ a Woman’s Space*, 45 WOMEN’S STUD. INT’L F. 42, 48 (2014) (“women are sitting ducks for assault”). Jeffreys, ultimately rejecting the argument others have made, notes the possibility of its reversal thus: “A gender-neutral bathroom, according to this logic, would make women safer from assault by men because of the presence of men [really: transwomen].” *Id.* One version of this argument—affirmatively offered in the context of venturing a case for urinary integration—is in Case, *supra* note 2, at 221 (observing that “the potential expected presence of both sexes in an integrated restroom could also on occasion act as a deterrent, by decreasing the likelihood a perpetrator will be alone with his intended victim and increasing the chances a bystander able and willing to offer aid will be present”).

<sup>34</sup> *Cf.* Petition for Writ of Certiorari at 31, *R.G. & G.R. Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019) (“Anyone—not just those with ‘medical diagnoses’—can profess a gender identity that conflicts with their sex. And as Stephens admitted during deposition, if an employer allows a male employee ‘to present as a woman,’ it must permit him to ‘go[] back to present[ing] as a man later on.’”) (alteration in original).

photonegative, on close inspection, might provide evidence that inculpates cis-heterosexual men while exonerating trans women. Understanding Harris's remarks this way brings sex difference back into the scene, and with a vengeance: "Man" and "woman" here are very different from one another, "man" (that's cis-hetero man) being "woman's" (that's cis-hetero woman's) enemy. More importantly perhaps, if this is right, Harris's argument offers up reasons for stopping cis-heterosexual men, women's natural sexual tormenters, by excluding *them* from Title VII sex discrimination protections, an argument that Harris has not otherwise sought to make. What would this mean for straight men who are actually sexually injured by other straight men—in showers or anywhere else?<sup>35</sup>

Treated as grounded in a vision of cis-heterosexual male sexual predation, Harris's argument is a striking declaration against interest that releases and may even temporarily abandon its focus on the pro-gay and the pro-trans arguments Karlan offered to the Court. Thinking that cannot be the whole story, especially recognizing that Harris's argument is meant a block against those claims, it makes sense to regard Harris's description of the shower scene as involving a "man" who is a gay man going in the ladies' shower or a trans woman going in there, misrepresenting her in the misgendered, male-identified terms Bursch would later use.<sup>36</sup> Here the shower scene performs gay/trans fungibility, specifically gay male/trans female fungibility, to a fare-thee-well.<sup>37</sup>

Recognizing that all of these possibilities are practically in play, it may not be necessary to adjudicate between or among them. Precisely because Harris's remarks involve these combinations—making it in a sense undecidable who this "man" in the ladies' shower in the hazardous materials facility is—they expose an important dimension of the shower's threat as cultural trope.

What that is, is found deep within an account provided by Kendall Thomas's brief and nearly perfect essay on the gays-in-the-military shower scene published as the debates on openly gay military service in the 1990s were themselves "raging the country."<sup>38</sup>

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<sup>35</sup> This kind of claim was in fact involved in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where Joseph Oncale, the cis-straight male plaintiff in the case, maintained as part of his larger sexual harassment claim that he suffered an attempted rape in a shower. See Brief of National Organization on Male Sexual Victimization, Inc. et al. at 2–4, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) (describing in the "statement of facts" that "[t]hat same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower"). For some discussion of *Oncale* and its relation to sex equality concerns, see Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004).

<sup>36</sup> See, e.g., Harris Funeral Homes Transcript, *supra* note 6, at 45 ("You could have a male employee who identifies as a woman but doesn't dress as a woman, looks like a man . . .").

<sup>37</sup> From a nonbinaristic perspective on sex, of course, it involves male/female fungibility, as well.

<sup>38</sup> Bostock Transcript, *supra* note 13, at 12; Kendall Thomas, *Shower/Closet*, 20 ASSEMBLAGE 80 (1993).

Thomas's essay, entitled "Shower/Closet," delivers an incisive analysis of the gays-in-the-military shower scene that corrects once-conventional thinking holding that that scene's import chiefly or exclusively involved its "scopic" possibilities: the prospects that gay men would be casting sexually-aggressive masculine gazes upon straight men's naked bodies in showers in ways that—as acts or symbols of sexual domination and violation—would strip those straight male troops of their masculinity, thereby, consistent with sex-binaristic thinking, reducing these erstwhile rough, tough, lean, mean, straight, American male "killing machines" into states of feminine submission, which might, the wild-eyed cultural logics suggested, lead to America's military defeat.<sup>39</sup> Think: The Rape of America. It's impossible to miss the *idea* of cis-heterosexual male/cis-heterosexual female fungibility that surfaces at just this point.

Recognizing these dynamics and how they operated within the symbolic economy of the military shower scene, "Shower/Closet" takes up the challenge of explaining how this scene vitally involved a different, if ultimately not unrelated, prospect of heterosexual men's sexual ruin. There was, after all, nothing formally new about men with same-sex desires being in military showers. Everyone in the military knew or had to know that men-desiring-men had long been in the showers lusting after those strong, muscular, wet, lathered-up, masculine bodies while thinking about the very good or very bad things they would like to do to them.<sup>40</sup> Understood as a scene about gay male sexual predation, of male dominance—decidedly *not* a scene involving gay men's desires for their own subordination at the hands of straight male troops playing the part of "rough trade"—the injunctions against gay men's "out" military service functioned as a way to police gay men and force them to police themselves, keeping their desires and the minor movements of their desiring bodies firmly in check, operating "very, very discreet[ly]," on pain not simply of separation from service by means of dishonorable discharges, but also possibly nothing less than violent—even lethal—reprisals by straight troops who would, singularly or in a group, manifest straight male unit cohesion to fight unto death to get their own alpha masculinity back.<sup>41</sup> What this effectively meant—other than perhaps exposing fears of homosexual alpha dogs as both projection and sheer nonsense, they being emphatically and readily brought to heel in these ways, politically powerless on their own to stop it—was that the injunction against gay men openly serving in the military was part of the

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<sup>39</sup> Thomas, *supra* note 38, at 80 ("scopic" possibilities); *id.* at 81 ("killing machines") (internal quotation marks removed). The proposal here is that "the scopophobia of straight male troops evidenced in recent media accounts [should be read] as the displaced expression of an epistemophobia or fear of knowledge which, by its very terms, its victims refuse to know." *Id.*

<sup>40</sup> *Id.* ("The ex-Navy Captain began by noting that 'we all know' that 'we've been able to live with homosexuals in our military quite well.'").

<sup>41</sup> *Id.* ("The Colonel defended the ban because it had forced gay men and lesbians in the armed forces 'to be very, very discreet, to stay in the closet, so that no one knew that their conduct didn't become a matter of command attention or public attention.'").

construction of a law-based military closet, which functioned to allow straight male troops to enjoy their all-male, homosocial showering and even the homosocial hijinks that could take place in the showers, while being protected by a “privilege of unknowing” about the fantasies that gay men might still be actively harboring about them.<sup>42</sup>

“Shower/Closet” thus proposes that the stakes of the shower scene were not simply or even primarily about gay men’s glances, stolen or otherwise, whether understood as acts or representations of other acts of sexual domination and violation. On an elemental level, the shower scene was about the social conditions of knowledge, about epistemology in this sense: what straight men knew, or got to know, or, more exactly, got to *not* know, when being in or moving through the shower as a distinctive social-architectural space.<sup>43</sup> The ban on gay men openly serving in the military ensured that straight troops could continue enjoying the luxury of not knowing about what gay men might be thinking about them. To lift the ban on gay men openly serving in the military would thus strip straight men of psychic-epistemic armor they had long enjoyed, perhaps unnoticed, forcing them to know—and to have to confront knowing—what they could previously never think or think seriously about. Gay men, legally freed to be out and themselves, might stop doing what they had been doing furtively. They and their male-body-focused sexual desires would henceforth be liberated, out in the open, including in the shower, under the protection of a legal right.

Accordingly, “Shower/Closet” reveals that the closet did not only involve its famous function of being the site for the production and maintenance of an oppressed and shamed gay male identity and same-sex desires.<sup>44</sup> Critically and crucially, the closet was *also* “the generative site of masculinist heterosexual identity.”<sup>45</sup> Holding this formative meaning for gay male identity *and* straight male identity, the elimination of the closet that gay troops were forced to occupy might be a net good and source of freedom for them, but it would also,

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<sup>42</sup> *Id.* at 81 (“The presence of ‘avowed’ homosexuals in the military would strip the straight troop of his ‘privilege of unknowing,’ leaving him naked to confront the disavowal of homosexual desire on which the homosocial apparatus of the military so crucially depends.”) (citation omitted). On homosocial hijinks, see *id.* (noting, with Alan Bérubé’s “history of gay men and lesbians in World War II,” “the importance of homosexualized ritual in male military culture,” including “‘homosexual buffoonery,’ a game in which a G.I. would play the role of ‘company queer,’” and then describing this play).

<sup>43</sup> *Id.* As Thomas put it: “[T]he ban debate is not so much a conflict over what can(not) be *seen*, as it is a controversy over what can(not) be *known*.” *Id.* at 80 (italics in original).

<sup>44</sup> *Id.* (describing “the closet [a]s the ‘defining structure of gay oppression in this century’”). On gay shame, GAY SHAME (David M. Halperin & Valerie Traub eds., 2009), is an indispensable resource. So, at the same time, are J. Halberstam, *Shame and White Gay Masculinity*, 23 SOC. TEXT 219 (2005), and Hiram Perez, *You Can Have My Brown Body and Eat It, Too!*, 23 SOC. TEXT 171 (2005).

<sup>45</sup> Thomas, *supra* note 38, at 80.

simultaneously, be a net evil and source of unfreedom for straight male troops.<sup>46</sup> The homosocial shower, up to that point “the straight male shower,” would cease being that the moment the ban on open military service by gay men ended.<sup>47</sup> And so, “Shower/Closet” crucially instructs that “the straight male shower” was neither an “opposing nor even abutting structure[]” in relation to the closet.<sup>48</sup> “The shower and the closet occupy the same psychic space.”<sup>49</sup> Hence the “Shower/Closet” as the title of the work.

“Shower/Closet” proceeds to describe the resulting threat to heterosexual men attendant upon lifting the ban on gay men openly serving in the military. The threat of lifting the ban on gay men’s open military service involves straight male troops being thrown into a new relation to knowledge that inevitably figured the prospects of psychic turmoil and/or distress. The essay chooses not to characterize this in the traditional registers of gay panic, but rather in the related terms of what the essay dubs a “‘wonder’ or epistemic panic.”<sup>50</sup> “Wonder” here carries the meaning not of awe, but of uncertainty, vulnerability, anxiety, puzzlement, confusion, even discombobulation, perhaps also nausea and disgust. “Epistemic panic” refers to the panic of knowing what one previously did not know.

Campily and wonderfully, the essay places a folksy account of “‘wonder’ or epistemic panic” in the mouth of a seaman who is quoted as talking publicly about the “fear[] that ‘if these people are allowed to come out of the closet, I’ll be serving aboard a ship and wondering who’s who and what’s what.’”<sup>51</sup> In this form, the “‘wonder’ or epistemic panic” of the shower/closet was not, the essay warns, “likely to confine itself to questions about the masculinity of the

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<sup>46</sup> This thinking about the closet’s meaning for male heterosexuality may help shed light on rhetorical gestures that frame legal, including constitutional, advances in the form of lesbian and gay liberation as types of closeting oppression—for others. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting) (“I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public they will risk being labeled as bigots and treated as such by governments, employers, and schools.”).

<sup>47</sup> Thomas, *supra* note 38, at 80.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 81.

<sup>51</sup> *Id.* (quoting Larry Rohter, *Off Base, Many Sailors Voice Anger Toward Homosexuals*, N.Y. TIMES, Jan. 31, 1993, at 20, <https://www.nytimes.com/1993/01/31/us/the-gay-troop-issue-off-base-many-sailors-voice-anger-toward-homosexuals.html> [<https://perma.cc/ZGL7-YZUQ>]). The full quotation of this “32-year-old tugboat master” in the *New York Times* reads: “A sea command now would mean I’m compromised. Privacy is almost nil when you go out to sea for six months, and if these people are allowed to come out of the closet, I’ll be serving aboard a ship and wondering who’s who and what’s what.” Larry Rohter, *Off Base, Many Sailors Voice Anger Toward Homosexuals*, N.Y. TIMES, Jan. 31, 1993, at 20, <https://www.nytimes.com/1993/01/31/us/the-gay-troop-issue-off-base-many-sailors-voice-anger-toward-homosexuals.html> [<https://perma.cc/ZGL7-YZUQ>].

homosexual Other.”<sup>52</sup> It was not likely to confine itself to being about what gay men were doing. Turning inward, the “‘wonder’ or epistemic panic” raised difficult, perhaps excruciating, maybe even devastating, questions for heterosexual troops themselves about nothing less than their own heterosexuality and masculinity. As the essay explains: “Given the homoerotic dimensions of male military culture, the straight troop might well be compelled to come to terms with the fragile and fluid nature of his own sexual and gender identities.”<sup>53</sup> Eliminate the closet, which would by necessity eliminate the “the straight male shower,” and the stage was set for a shower scene with gay men in which heterosexual manhood—both as to its sexual and gender components—was at risk of coming undone.<sup>54</sup> Straight men could no longer be able to know with certainty about themselves or about anyone else “who’s who and what’s what.”<sup>55</sup> Male heterosexuality as a grounding psychic force, unraveled, undone, would leave straight male troops in a panic of wonder and not knowing.<sup>56</sup>

Read against the backdrop of this analysis, Harris’s anxious rush during what he believed to be the final moments of his argument toward a representation of a hazardous materials factory’s ladies’ shower inhabited by a man whose “sexual and gender identit[y]” remained out of focus looks like an indication that Harris—whether he precisely intended it or not—understood that the logics of the shower scene can involve the unraveling of the ordinary sexual and gender precisions of “man.”<sup>57</sup>

Harris’s remarks were scarcely the only sign of psychic experiences of wonder and its attendant disorientation circulating in the sexual identity cases. Earlier on, during an exchange between Justice Samuel Alito and Pamela Karlan, for instance, Justice Alito offered a wonderfully frank description of his own experiences encountering the various arguments being made by the parties to the gay sex-discrimination cases. Clarifying an “argument” he was making, Justice Alito remarked: “And your core -- the -- the parties have in their briefs, have all of these comparisons, and they will make your head spin if you -- if you try to figure them all out.”<sup>58</sup> This account of having studied “all of these comparisons” in the parties briefs winds up sounding like a report that echoes

<sup>52</sup> Thomas, *supra* note 38, at 81.

<sup>53</sup> *Id.* Here may be a sign of the power of sexuality described by Shannon Winnubst as “[l]ocated in the Lacanian register of the real (or what we might call the drive in the Freudian schema)” as “fundamentally chaotic, turbulent, disordered, and disordering.” WINNUBST, *supra* note 9, at 139.

<sup>54</sup> Thomas, *supra* note 38, at 80.

<sup>55</sup> *Id.* at 81.

<sup>56</sup> *Id.* (“When the straight male troop walks into the shower room in the future, he will do so in the knowledge that he has been driven out of his own closet.”).

<sup>57</sup> Bostock Transcript, *supra* note 13, at 48–52. In actuality, as the transcript shows, Harris’s time went on longer than that. *Id.* The language of “sexual and gender identit[y]” comes from Thomas, *supra* note 38, at 81.

<sup>58</sup> Bostock Transcript, *supra* note 13, at 28–29.



that seaman's fears about what would happen were the ban on open gay military service to be lifted: doing his job, he'd be there looking around "wondering who's who and what's what."<sup>59</sup>

Sexual and gender confusions—or gender and sexual confusions, either way—also emerged during oral arguments in some classically Freudian ways. This is U.S. Solicitor General Noel Francisco speaking shortly after Harris brought up the shower scene, until he found it necessary to stop and correct himself: "[S]ex means whether you're male or female, not whether you're gay or straight. So if you treat all gay and men -- gay men and women exactly the same regardless of their sex, you're not discriminating against them because of their sex."<sup>60</sup> Here Francisco's remark has him, before his self-correction, casually saying what many people, not thinking about femme women-loving-women, still sometimes think when they think of gay men and lesbians: "gay [men] and *men*."<sup>61</sup> And this slip-o-the-tongue happened even after an earlier exchange in which Justice Sonia Sotomayor expressly warned against the erroneous confusions by which one might be led to think that, "[i]f you're too macho a woman, you're a lesbian."<sup>62</sup>

The amusement that gender and sexual confusion can generate likewise received a share of intentional play in the arguments. Gender neutrality—a form of gender imprecision that can at times lead to confusion—was repeatedly performed in the courtroom in ways meant to produce laughs.<sup>63</sup> Responding to

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<sup>59</sup> Thomas, *supra* note 38, at 81. One illuminating, generous, politically powerful, and beautiful way of recognizing why "[t]he sheer variety of trans bodies and genders" can sometimes feel excessive and even challenge one's "cognitive capacity to comprehend them" identifies this feeling of "[f]eeling overwhelmed" as an "experience of the sublime." T. Benjamin Singer, *From the Medical Gaze to Sublime Mutations: The Ethics of (Re)Viewing Non-Normative Body Images*, in THE TRANSGENDER STUDIES READER 601, 616 (Susan Stryker & Stephen Whittle eds., 2006). Singer likewise indexes "shutting down" as a "form of psychical protection against the terror of boundary collapse at the edge of limitlessness." *Id.*

<sup>60</sup> Bostock Transcript, *supra* note 13, at 53. Mentioning when the remarks surfaced is strictly meant as a temporal observation, not a causal claim, which is not to deny that one might be made, only to say none is being made here.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.* at 50. SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS (J. Strachey trans., 1960), remains the conventional starting point on parapraxes.

<sup>63</sup> For a related way of speaking to these problematics that traces what's figured as the problem of "transgender ideology" to its "roots in gender theory and in certain strains of feminist thinking about our embodiment," consider:

First-wave feminism was a campaign to liberate women from an overly restrictive concept of gender, so they could be free to fulfill their nature, but it gave way to a movement seeking to make women identical to men. From the error of inflexible stereotypes, our culture swung to the opposite error of denying any important differences between male and female. The result is a culture of androgyny and confusion.

Karlan's bet that Chief Justice John Roberts would address her opposing counsel as "Mr. Harris" when he stood to speak, the Chief Justice mischievously made a point of using a gender-neutral form of address to show that he was capable of taking Karlan's money and treating her and Harris exactly alike.<sup>64</sup> As Karlan stepped down and Harris stepped up to take the podium, the Chief Justice spoke thus: "CHIEF JUSTICE ROBERTS: [To Karlan] Thank you, counsel. [Then to Harris:] Counsel."<sup>65</sup> This sex-neutral term of address—which pressed back against who Ms. Karlan and Mr. Harris were in sex-specific terms—prompted laughter in the courtroom, for which Chief Justice Roberts graciously apologized, "Sorry."<sup>66</sup> And well enough. No laughing matter, sex-neutrality has been both a lifework and a lifeline that has conduced to less sex discrimination and hence more sex equality and liberty as matters of statutory and constitutional right.<sup>67</sup> Without missing the chance to make his own play against sex neutrality and its imprecisions—he being, after all, very different from Ms. Karlan—counsel Harris began his presentation with a notably over-articulated, "Mr. Chief Justice, and may it please the Court."<sup>68</sup> Laughter ensuing, Justice Roberts replied, "Touché," before Harris, having made his point, pressed on to the remainder of his argument, which flowed from his related understanding of Title VII's definition of "sex" being tied to sex's traditional truths.<sup>69</sup>

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ANDERSON, *supra* note 33, at 6; *see also id.* at 148 (making the same basic observation). For how sex-neutrality may precisely be an object of concern in some quarters, see Spindelman, *The Showers Return, Part III*, *supra* note 1, at 109 n.29.

<sup>64</sup> Bostock Transcript, *supra* note 13, at 12, 31 ("When I got up, the Chief Justice said to me, 'Ms.' Karlan, I am willing to bet any amount of money I have that when Mr. Harris gets up, he is going to say 'Mr.' Harris.").

<sup>65</sup> *Id.* at 31.

<sup>66</sup> *Id.* A report on the moment from the courtroom is in Mark Walsh, A "View" from the Courtroom: Pop Culture and Protocol, SCOTUSBLOG (Oct. 8, 2019), <https://www.scotusblog.com/2019/10/a-view-from-the-courtroom-pop-culture-and-protocol/> [<https://perma.cc/A8ZG-42TR>] ("When it is time for Harris to begin his argument, the chief justice devilishly recognizes him by saying 'Counsel' instead of 'Mr. Harris.' As the courtroom erupts in laughter, Roberts says, 'Sorry.'").

<sup>67</sup> *See generally* Wendy Webster Williams, *Justice Ruth Bader Ginsburg's Rutgers Years: 1963–1972*, 31 WOMEN'S RTS. L. REP. 229 (2010); Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41 (2013). For further discussion, see Spindelman, *The Shower's Return, Part III*, *supra* note 1, at 108–09, 109 nn.28–29.

<sup>68</sup> Bostock Transcript, *supra* note 13, at 31 (emphasis added).

<sup>69</sup> *Id.* at 31. For the traditional understanding of "sex" embraced and advanced by the defense in briefing in Bostock and Zarda's cases, see Zarda Brief for Petitioners, *supra* note 14, at 11–23 (discussing "original public meaning" of "sex" in Title VII and related argument about how it should be understood to operate in relation to Zarda's Title VII sex discrimination claims); Brief for Respondent at 6, *Bostock v. Clayton Cty.*, No. 17-1618 (Aug. 16, 2019) ("The original public meaning of 'sex' in 1964 was being male or female. This public meaning remains the same today."); *id.* at 7–8 (discussing how this definition of "sex" works in the context of the sex stereotyping claim involved in the case); *id.* at 12–17

Reflecting back on these developments, how serious are these illustrations of gender and sexual confusion? How serious are these moments of the unconscious exposing itself? How serious are these jokes?

Whatever the answers, these examples, from their different locations, reflect something important that was happening closer to—if not right at—the normative heart of the gay sex-discrimination cases as they were being argued at the Supreme Court. Though lesbians and gay men, unlike trans people, are now known figures at the Supreme Court, its doctrine now generally treating lesbians and gay men and their lives as fully constitutionally, hence legally, normative, it is still the case that thinking about gay men, at least in the context of arguments that also involve trans women, raised a specter of conventional strictures and structures of gender and sexuality coming undone.

*Indeed, as will become clear next time, gender imprecision—really gender confusion—about who’s who and what’s what in relation to gender and sexual identity showed up as an important argument from the Bench as a way to collapse the case for gay Title VII sex discrimination rights. Stay tuned.*

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(discussing definition of “sex” under Title VII, and comparing it to definition of sexual orientation); *id.* at 36–40 (discussing “sex” in the context of a Title VII sex stereotyping claim). For some perspective on the role of laughter in LGBT civil rights litigation, see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 105–06 (2007) (commenting, after describing courtroom laughter that erupted as “disbelieving mirth” during oral arguments in *Lawrence v. Texas*—laughter that functioned as a way of dismissing an anti-gay line of thought that Justice Antonin Scalia was expressing: “[o]ne way of tracking the gay rights movement is to listen to the laughter attending it”; “[w]ho is laughing, and with what emotion, has changed very much, very quickly”). Thanks to Courtney Cahill for engagement on laughter.